

Letter of Findings: 04-20140023
Gross Retail Tax
For the Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUE

I. Gross Retail Tax – Exempt Diesel Fuel Sales.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-2-1(b); IC § 6-2.5-7-3(b); IC § 6-2.5-8-8; IC § 6-2.5-8-8(a); IC § 6-2.5-8-8(e); IC § 6-8.1-5-1(c); IC § 6-2.5-9-3; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-8-12](#); [45 IAC 2.2-8-12\(d\)](#); [45 IAC 2.2-8-12\(f\)](#).

Taxpayer argues that the Department of Revenue should accept the information it provided as sufficient to establish that otherwise undocumented sales of diesel fuel were exempt from sales tax.

STATEMENT OF FACTS

Taxpayer is a combination fuel station and convenience store. Taxpayer sells gasoline, racing fuel, kerosene, and diesel fuel. As a "convenience store," Taxpayer sells food items, soft drinks, and other merchandise.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's tax returns and business records. The audit resulted in the assessment of additional sales tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax – Exempt Diesel Fuel Sales.

DISCUSSION

Taxpayer argues that the Department's audit overstated the amount of tax owed on its sale of diesel fuel and that the information provided is sufficient to reduce the assessment amount.

At the outset of the audit, Taxpayer and the Department agreed that the audit would utilize a "September and October 2013" sample period to determine the amount of tax potentially due for the three-year audit period.

The audit report states that it discovered taxable diesel sales where sales tax was not charged or collected and for which a valid ST-105 ("General Sales Tax Exemption Certificate") exemption certificate was not on file. Additional taxable diesel sales for the sample period reviewed were totaled and divided by the exempt diesel sales for the sample months as reported on the ST-103MP's ("Monthly Trust Tax Return"). This resulted in an error percentage. The error percentage was then applied to the total exempt sales reported to arrive at the additional taxable diesel sales.

During the course of the audit, the Taxpayer provided exempt diesel sales documentation for September and October in the form of "pink sales slips" which purportedly contained the information equivalent to that found on the standard ST-105 exemption certificates.

The audit report noted that IC § 6-2.5-7-3(b) provides as follows:

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

Nonetheless, the audit accepted the "pink slips" as evidence that the transactions documented were exempt from sales tax. However, Taxpayer was unable to provide additional documentation supporting the exempt status of other diesel fuel sales.

Both during the audit and during the course of the administrative hearing, it was Taxpayer's position that they were maintaining the same type and quality of records that other fuel retail stores were maintaining and that the Department was holding it to an unreasonably strict record-keeping standard.

Although Taxpayer agrees with the two months "sampling," Taxpayer believes that they are being held to a higher standard of behavior than other fuel vendors, that the assessment is substantially overstated, and that the additional information provided could establish the correct amounts of exempt and non-exempt diesel sales.

Taxpayer argues that because the audit previously accepted "pink slips" as proof that these transactions were exempt, the pink slips should be accepted as "evidence of blanket purchase exemption requests." Taxpayer asks that the Department accept the pink slips as blanket exemption certificates and recompute the amount of sales tax due.

In addition to the "pink slips," Taxpayer maintained a "Rolodex" of cards identifying its exempt customers. Rather than obtaining an exemption certificate from each customer for each transaction or blanket exemption for each customer, the Taxpayer's employee simply consulted the "Rolodex" to identify the customer as either "exempt" or "non-exempt." This Letter of Findings refers to the accumulated information contained in the Rolodex as its "Fuel Log."

During the administrative hearing, Taxpayer's representative provided a copy of the information contained on the Fuel Log as "additional business records in total" which, as Taxpayer asserts, "provide[s] the information for the adjusted sales that is equivalent to that found on the ST-105 exemption certificate."

It should be noted at the outset, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a gross retail (sales) tax on retail transactions and imposes on the vendor responsibility for collecting the tax. IC § 6-2.5-2-1 provides as follows:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Exempt entities may avoid paying the sales tax by presenting the vendor a valid exemption certificate. IC § 6-2.5-8-8 states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.
- (d) A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:
 - (1) a fully completed exemption certificate; or
 - (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.
- (e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:
 - (1) obtain a fully completed exemption certificate; or
 - (2) prove by other means that the transaction was not subject to state gross retail or use tax.

[45 IAC 2.2-8-12](#) imposes on each vendor certain limitations on the use of the exemption certificate and imposes on those vendors responsibility for either collecting the tax or obtaining the certificate.

- (a) Exemption certificates may be [issued] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.
- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt

purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported. (Emphasis added).

Therefore, as provided by IC § 6-2.5-8-8(a), a vendor such as Taxpayer accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. However, as provided in [45 IAC 2.2-8-12](#)(f), an exemption certificate issued by a purchaser is not valid unless it is executed in the prescribed and approved form and unless all information requested on the form is completed. In addition, the instructions on the ST-105 state, "Sales tax must be charged unless all information in each section is fully completed by the purchaser."

In the absence of valid exemption certificates, [45 IAC 2.2-8-12](#)(d) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the State or that Taxpayer's customers did indeed use the diesel fuel for exempt purposes.

IC § 6-2.5-7-3(b) specifically requires retail merchants who sell special fuel from metered pumps to collect exemption certificates from their customers when they make exempt sales. In the absence of exemption certificates, the sales are deemed taxable. IC § 6-2.5-7-3 provides as follows:

(a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by
- (2) seven percent (7[percent]).

The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

(b) With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with [IC 6-2.5-8-8](#), a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by
- (2) seven (7[percent]).

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#). (Emphasis added).

The language of IC § 6-2.5-7-3(b) is unequivocal in its requirement that vendors collect exemption certificates for a vendor's exempt sale of diesel fuel.

A. Additional "Pink Slips."

Taxpayer points to the provision set out in IC § 6-2.5-8-8(e) which allows a seller 120 days to "prove by other means" that the transaction was not subject to gross retail or use tax.

Taxpayer has provided additional "pink slips" which purport to establish that it sold diesel fuel to customers which were exempt from sales tax. Since the audit accepted the originally provided "pink slips" as evidence of exempt transactions, the audit division is requested to review the newly submitted "pink slips" and – assuming that the transactions took place during the two month sample period – make whatever adjustments are warranted.

B. Clerical Errors.

During the administrative hearing, Taxpayer provided additional information which purports to correct simple clerical errors. For example, Invoice 127337 states that one of Taxpayer's customers bought 21.633 gallons of exempt diesel fuel for which the audit report indicates that the customer paid \$87.39 when the actual amount was \$87.59. The discrepancies are significant because Taxpayer was given "credit" for certain amounts of exempt sales. Most of the remaining clerical errors involve larger dollar amounts but the premise remains the same as the example cited. As with section "A" above, the audit division is requested to review the relevant documentation and to make whatever adjustments are warranted.

C. "Rolodex" Customer Information.

As mentioned previously, Taxpayer accumulated hand-written customer information on Rolodex cards. This information is referred to alternatively as Taxpayer's "fuel log." As explained by Taxpayer:

[Taxpayer] maintained the Rolodex, which included the business associated with tax exempt purchases. The Rolodex included the legal business name, or d/b/a name, and an identification number associated with the business. The identification number for the business was [either] a MC Number, DOT Number, and/or TID

number . . . By maintaining a [R]olodex with the MC Number, DOT Number, and/or TID Number, [Taxpayer] had the DOT Number or TID Number for each business receiving a sales tax exemption on diesel fuel. [Taxpayer] is able to use the MC Number, DOT Number, or name of a business to obtain a Company Snapshot from the government showing the name, address, phone number, DOT Number, and MC Number of the business. The Company Snapshot includes the equivalent information to Form ST-105.

Taxpayer provided a sample of the "Company Snapshot" containing customer information obtained from various public sources.

Taxpayer believes its "Fuel Log" is an entirely satisfactory substitute for the missing exemption certificates. However, Taxpayer's "Fuel Log" is not a record of transactions and does not establish which transactions are exempt and which are not exempt. Taxpayer apparently assumes that any customer which provides an MC Number ("Motor Carrier"), DOT Number (Department of Transportation), or TID Number ("Tax Identification") is exempt from sales tax. The Department must disagree with Taxpayer's premise. The Department does not agree that every vehicle with a Motor Carrier, DOT, and TID number and which consumes diesel fuel is necessarily exempt. Common experience would seem to indicate that certain diesel-powered vehicles are not engaged in "public transportation," agricultural activities, in another exempt activity, or that otherwise "exempt customers" may occasionally purchase fuel for use in a non-exempt manner. Moreover, IC § 6-2.5-7-3(b) is clear that vendors of diesel and other special fuels are required to collect sales tax on each transaction in the absence of a valid exemption certificate and is then required to hold "the tax as agent for the state." IC § 6-2.5-2-1(b). (The retail merchant "holds . . . taxes in trust for the state and is personally liable for the payment of those taxes . . ." IC § 6-2.5-9-3).

As explained in the Department's regulation, [45 IAC 2.2-8-12\(d\)](#):

Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof.

The Department is unable to agree that, in the absence of a properly completed exemption certificate, the Rolodex information is sufficient to establish that the "purchaser used the [fuel] for exempt purpose." As noted previously, IC § 6-8.1-5-1(c) places on Taxpayer the burden of establishing that the audit assessment was "wrong." Taxpayer has failed to meet this standard.

Nonetheless, Taxpayer maintains that it was denied an opportunity to provide additional information pursuant to IC § 6-2.5-8-8(e).

(e) If a seller has accepted an incomplete exemption certificate under subsection (a) and the department requests that the seller substantiate the exemption, within one hundred twenty (120) days after the department makes the request the seller shall:

- (1) obtain a fully completed exemption certificate; or
- (2) prove by other means that the transaction was not subject to state gross retail or use tax.

However, the Department's audit began February 2013 and was not completed until September 2013 during which the issue of undocumented exempt diesel sales was discussed at length. During the eight months the audit was underway, Taxpayer was able to provide additional information which the audit duly considered. Taxpayer filed its protest December 2013 and the administrative hearing conducted March 2014. Taxpayer had ample opportunity to provide what information it thought necessary and – as explained above – the Department did in fact accept the additional information provided during the hearing. The Department is unable to agree that Taxpayer had insufficient time in which to gather the necessary information.

FINDING

Taxpayer's protest is sustained in part and denied in part.

SUMMARY

The Audit Division is requested to review both the additional "pink slips" and the purported clerical errors contained within the original audit report, and to make whatever adjustments are necessary; the Department does not agree that the Rolodex records are sufficient to verify that the otherwise undocumented diesel transactions are exempt; the Department does not agree that Taxpayer was denied sufficient time in which to prepare and submit additional documentation on the otherwise undocumented diesel transactions.

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